IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Appellant,	)	
vs.	)	No. 20178
SHIRLEY C. THOMPSON,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

KENNETH S. SCOVILLE
407 Luhrs Tower
Phoenix, Arizona
Attorney for Appellant

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STATEMENT OF BASIS OF JURISDICTION

U. S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA

In the complaint, appellee (plaintiff below) alleged that the amount in controversy was in excess of $10,000.00 exclusive of interest and costs and that appellee was a resident of Idaho, whereas appellant was a mutual insurance company organized under the laws of Illinois. (Transcript of Record (hereinafter referred to as T.R.) 1.) 28 U.S.C.A. §1331-2.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

On March 29, 1965, the U. S. District Court for the District of Arizona entered Summary Judgment in favor of appellee and against appellant. (T.R. 128) On April 26, 1965, appeal was taken to this court (T.R. 57). 28 U.S.C.A. §1291.

STATEMENT OF THE CASE

This is an action brought in the U. S. District Court for the District of Arizona against appellant, State Farm Mutual Automobile Insurance Company to recover from appellant upon a judgment for bodily injuries arising out of an automobile accident, said judgment having been rendered in Superior Court of Arizona, in and for the County of Maricopa, in favor of appellee and against Joel Bailleres, an "additional insured" under a policy of automobile liability insurance issued by appellant.

The automobile insurance policy upon which this action is based excludes damages for bodily injury to the insured or any "member of the family of the insured residing in the same household as the insured." (T.R. 20)

Prior to August 4, 1959 (the date of the accident), appellee Shirley C. Thompson was married to John F. Thompson; however, she believed that her marriage to John F. Thompson had been finally terminated by final divorce prior to August 1, 1959, and that she was under no legal disability which would prevent her entering into another lawful marriage. (T.R. 69, 76)

Prior to August 4, 1959, Shirley C. Thompson resided in and maintained her household in an apartment in Scottsdale, Arizona. Over the weekend of August 1 and 2, 1959, Shirley C. Thompson and Joel Bailleres travelled together to Nogales, Sonora, Mexico, with the intent and purpose of getting

married to each other (T.R. 56, 59). In her deposition, Shirley C. Thompson testified that she got drunk and doesn't remember the marriage ceremony (T.R. 31). Appellee and Joel Bailleres registered in a hotel in Nogales as husband and wife, and while so registered, resided in the same room at the hotel and engaged in sexual relations (T.R. 56, 59).

Shirley C. Thompson and Joel Bailleres returned together from Nogales to Scottsdale, Arizona, and Joel Bailleres took up residence in the same household as Shirley C. Thompson (T.R. 56, 59). They resided together in the same apartment for about a week prior to August 4, 1959, the date of the accident (T.R. 68, 75). During this period, appellee and Joel Bailleres lived together as husband and wife (T.R. 33). They prepared their meals together and ate together. Appellee told some of her friends that she and Joel Bailleres were married (T.R. 68, 75).

On August 4, 1959, appellee and Joel Bailleres had dinner together at their apartment (T.R. 34); they went next door together to a friend's house (Eleanor Gunderson) to watch television (T.R. 35). Around 10:00 or 10:30 p.m., they left the Gundersons and went to the Wagon Wheel bar (T.R. 37). Later that evening the accident occurred.

After the accident, appellee was hospitalized (T.R. 38). She also told the nurses that she was married to Joel Bailleres (T.R. 68, 75). Bailleres picked up the appellee at the hospital, took her to their apartment where they continued to live together as husband and wife for another month and a half

(T.R. 38, 68, 75). Bailleres then stated to appellee that they weren't really married in Mexico and they separated (T.R. 40).

Appellant's policy provides: "No action shall lie against the company: Unless as a condition precedent thereto there shall have been full compliance with all terms of this policy."

The policy further provides:

> "3. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and upon its request, attend hearings and trials, assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance." (T.R. 21)

On August 31, 1959, Joel Bailleres expressly entered into a non-waiver of rights agreement with State Farm Mutual Automobile Insurance Company (T.R. 89).

On or about June 7, 1960, suit was filed by Shirley C. Thompson against Joel Bailleres. Subsequent to the filing of the suit, Joel Bailleres notified State Farm of the suit and requested that the company employ counsel and defend the action. By reason of the aforesaid demands and the provisions of said policy, appellant caused the usual and proper investigation of the facts and circumstances surrounding the accident to be prepared and employed Kenneth S. Scoville of Phoenix, Arizona, to answer and defend the action on behalf of Joel Bailleres. On or about November 14, 1960, said attorney prepared and served an answer in said action. Thereafter,

It was discovered that at the time of the accident Shirley C. Thompson and Joel Bailleres were living together and holding themselves out to be husband and wife and that said Shirley C. Thompson was a member of the family of said Joel Bailleres, residing in the same household as Joel Bailleres (T.R. 85).

On October 17, 1960, appellant caused a letter to be mailed via certified mail in the United States Post Office, Phoenix, Arizona, return receipt requested, to Joel Bailleres, at his last known address, further expressly informing him of his obligation to cooperate and reserving the company's rights in regard to defense (T.R. 90-92).

On November 8, 1960, appellant received a letter signed by Joel Bailleres in which Bailleres warranted and promised to cooperate with the company and its attorneys (T.R. 93).

On November 10, 1960, appellant again by letter (T.R. 93a) notified Joel Bailleres at his last known address of his duty of cooperation.

Thereafter Joel Bailleres wholly and totally failed and refused to cooperate with appellant and wholly and totally failed and refused to keep appellant and its attorneys advised of his whereabouts. Numerous letters were sent to Bailleres at his last known addresses, but to no avail. Appellant claims personnel, both locally and all over the country, searched diligently and pursued all customary and proper forms of investigation and inquiry to determine the whereabouts and residence address of Joel Bailleres, but to no avail. By reason

of the non-cooperation of said Joel Bailleres and other policy defenses, the attorneys hired by appellant had no alternative but to withdraw from the representation of said Joel Bailleres (T.R. 85).

On March 13, 1962, judgment was rendered in favor of appellee and against Bailleres in Cause No. 116606 in the Superior Court of Arizona, in and for the County of Maricopa, in the amount of $32,658.50, including costs (T.R. 1). Thereafter, appellee brought suit against appellant insurer in the court below to recover on the judgment against Bailleres (T. R. 1-3). An answer was filed on behalf of appellee (T.R. 4-6). After performing discovery, etc., both appellant and appellee filed Motions for Summary Judgment supported by affidavits, etc. (T.R. 24-42, 81-93, 8-23, 94-108).

Appellant insurer's motion for summary judgment was based upon the "household exclusion" clause and the defense of non-cooperation. Appellee did not controvert the facts of Bailleres' non-cooperation, rather, appellee argued only that:

> "the defense of non-cooperation has been eliminated in the State of Arizona by the provisions of Arizona Revised Statutes §28-1170 (f) and the cases of Schecter v. Killingsworth, 93 Ariz. 273, 380 P.2d 136, Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145." (T.R. 9)

Both motions were extensively briefed and argued, and on February 18, 1965, the court below entered an order granting appellant's motion for summary judgment and denying appellee's motion for summary judgment (T.R. 112).

Both appellant and appellee filed proposed forms of judgment. Appellee's proposed judgment awarded the sum of $10,000.00 (appellant's policy limits), plus interest on the entire judgment of $32,658.50 from March 13, 1962 (the date of entry of judgment in the Superior Court of Maricopa County). Appellant objected to the appellee's judgment on the ground that in any event appellant's liability was limited to the $5,000.00 limits required by the Arizona Financial Responsibility Law §28-1170 B 2 A.R.S. at the time of the accident in 1959. Appellant also objected that the interest could not exceed interest on the $5,000.00 limits, not interest on the entire judgment of $32,658.50 (T.R. 113-115, 124-127). On March 29, 1965, the court below entered judgment in accordance with appellant's proposed form of judgment (T.R. 128) and thereafter this appeal was timely taken (T.R. 129).

SPECIFICATION OF ERRORS

Appellant submits that the court below erred:

1. In granting appellee's motion for summary judgment,
2. In entering judgment in favor of appellee and against appellant,
3. In denying appellant's motion for summary judgment,
4. In failing to enter judgment in favor of appellant and against appellee, and

5. In denying appellant's motion to vacate and/or alter and/or amend such judgment.

All for the following grounds and reasons:

A. Appellant submits that the uncontroverted evidence established that at the time of the said accident appellee was a "member of the family" of Joel Bailleres, and "residing in the same household as the insured," Joel Bailleres, and holding themselves out as husband and wife, and thereby excluded from the coverage of appellant's policy.

B. It is admitted that subsequent to the alleged accident that said Joel Bailleres failed to cooperate with appellant-insurer, seriously prejudicing appellant and thereby materially breaching a condition of said policy, compliliance with which is expressly made a condition precedent to appellant's liability and further that by reason of such material breach, appellee is also prevented from seeking recovery from appellant-insurer.

ARGUMENT

A. Summary:

1. Appellee is excluded from appellant's policy by the "household exclusion" clause.

2. Non-cooperation of the insured is a valid policy defense under Arizona law.

B. HOUSEHOLD EXCLUSION CLAUSE:

The uncontroverted evidence clearly indicates that at the time of the accident, as a matter of law, Shirley C. Thompson was a "member of the family" of the insured (Bailleres), residing in the same household as the insured, so as to fall within the "household exclusion clause" in appellee's policy. Shirley Thompson and Bailleres were living together as husband and wife, even though not legally married. They took their meals together, had sex relations and Shirley Thompson introduced Bailleres to others as her husband. A clearer "family" arrangement could not be found.

In the case of Tomlyanovich v. Tomlyanovich, 239 Minn. 250, 58 N.W.2d 855, 50 A.L.R.2d 108 (1953) plaintiff and defendant were brothers and both lived at their parents' home. The court held that plaintiff fell within the household exclusion and stated:

> "'...The word "family" is also of flexible meaning. The meaning varies as the question arises under homestead laws, or exemption laws, or pauper laws, or under insurance policies or wills, or other conditions. Its primary meaning is a collection of persons who live in one house and under one head or management. Dodge v. Boston & Prov. R. R. (Corp.), 154 Mass. 299, 28 N.E. 243, 13 LRA 318. In that sense it has frequently been defined as synonymous with household.'
>
> Here the word 'family' is used in a clause restricting the liability of an indemnity insurer in an automobile policy. Its obvious purpose is to exempt the insurer from liability to one who would

> naturally and inevitably be partial to another because of the close filial ties which exist between members of the same family circle living in the same household. The same reasons exist for restricting its liability to those not members of such family circle whether the injured party is the head of the household, a child or spouse of the head, or simply a member of it. Under these circumstances, the words used should be given that meaning which they ordinarily would have in order to effectuate the obvious purpose intended by the exclusionary clause. The trial court correctly held that plaintiff was within the excluded class."
>
> 50 A.L.R.2d 118, 119.

In another case involving appellant's policy, the household exclusion clause of defendant's policy has been held to apply to persons who are not relatives by blood or marriage of the insured.

In State Farm Mutual Auto. Insurance Company v. James, (CCA W. Va. 1936) 80 F.2d 802, the court held the household exclusion to apply to "a paying boarder, who, after she lost her employment, continued to spend about half her time at the insured's home, paying nothing, but sometimes helping with household work, performing small services of her own accord, sleeping with one of insured's daughters, eating her meals with the family, and associating with them generally." (50 A.L.R.2d 122)

Perhaps the closest case on point is that of Hunter v. Southern Farm Bureau Casualty Insurance Co., 241 S.C. 446, 129 S.E.2d 59 (1962). In the Hunter case the court held the household exclusion to apply to a woman who was living

adulterously with the insured as his wife, even though the insured had a living wife from whom he was not divorced Appellant respectfully submits that the uncontroverted evidence and authorities clearly indicate that the court below erred in failing to hold that appellee fell within the household exclusion clause of appellant's policy and was therefore not entitled to the benefits of the liability provisions. On these grounds alone appellant respectfully submits that the judgment of the court below should be reversed, and the case remanded with instructions that judgment be entered in favor of appellant and against appellee.

C. JOEL BAILLERES' BREACH OF THE COOPERATION CLAUSE OF DEFENDANT'S POLICY PRECLUDES APPELLEE FROM RECOVERY.

It is uncontroverted that Joel Bailleres breached his duty of cooperation owed to defendant under its policy and that such breach materially prejudiced defendant insurer, thereby obviating any liability which defendant might have to either Bailleres or to appellee. The court below so found in awarding appellee $5,000.00, the Financial Responsibility limits, rather than $10,000.00, the actual limits of appellant's policy. The court below held that (to the extent of the limits required by the Arizona Financial Responsibility law) "non-cooperation" is no longer a valid defense in Arizona after the case of Jenkins v. Mayflower Insurance Exchange, 93 Ariz. 287, 380 P.2d 145 (1963). In the Mayflower case, the Arizona Supreme Court held the "omnibus" clause (extending insurance coverage to the operation of a vehicle

by a permissive user set out in §28-1170 B 2, A.R.S.

to be a part of "every motor vehicle liability policy."

§28-1170 A, A.R.S. Provides:

"A 'motor vehicle liability policy' as the term is used in this chapter means an owner's or an operator's policy of liability insurance, certified as provided in §28-1168 or §28-1169 as proof of financial responsibility, and issued, except as otherwise provided in §28-1169, by an insurance carrier duly authorized to transact business in this state, to or for the benefit of the person named therein as insured." (Emphasis supplied)

§28-1168. Certificate of insurance as proof

"A. Proof of financial responsibility may be furnished by filing with the superintendent the written certificate of an insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. The certificate shall give the effective date of the motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate the explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

B. No motor vehicle shall be or continue to be registered in the name of a person required to file proof of financial responsibility unless the motor vehicle is so designated in such a certificate."

§28-1169. Certificate furnished by nonresident as proof

"A. A nonresident owner of a motor vehicle not registered in this state may give proof of financial responsibility by filing with the superintendent a

written certificate or certificates of an insurance carrier authorized to transact business in the state in which the motor vehicle, or motor vehicles, described in the certificate is registered, or if the nonresident does not own a motor vehicle, then in the state in which the insured resides, provided the certificate otherwise conforms with the provisions of this chapter, and the superintendent shall accept the same upon condition that the insurance carrier complies with the following provisions with respect to the policies so certified:

1. The insurance carrier shall execute a power of attorney authorizing the superintendent to accept service on its behalf of notice or process in any action arising out of a motor vehicle accident in this state.

2. The insurance carrier shall agree in writing that the policies shall be deemed to conform with the laws of this state relating to the terms of motor vehicle liability policies issued herein.

B. If an insurance carrier not authorized to transact business in this state, which has qualified to furnish proof of financial responsibility defaults in any such undertaking or agreement, the superintendent shall not thereafter accept as proof any certificate of the carrier whether theretofore filed or thereafter tendered as proof, so long as the default continues.

It is the obvious import of these sections that they ave no application to policies other than "certified" nes. The record in this case is devoid of any evidence f such "certification" of appellant's policy.

The Arizona Supreme Court in the Mayflower case did ot hold or even imply that it was therein abrogating any nd all policy defenses theretofore available to insurers

n Arizona. In Mayflower, the Arizona Court followed the ead of the California Supreme Court, the only other court o read into a "non-certified" automobile liability policy he omnibus clause. See Wildman v. Government Employees' ns. Co., 48 Cal.2d 31, 307 P.2d 359 (1957). However, even n California the defense of "non-cooperation" is still avail- ble to the insurer.

Campbell v. Allstate Insurance Company, 32 Cal. Rptr. 827, 384 P.2d 155 (1963);

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 P.2d 999 (1932).

Other cases confirming the validity of the defense of on-cooperation are as follows:

Johnson v. Universal Automobile Insurance Ass'n., 124 S.2d 580 (La. App. 1960);

Adriaenssens v. Allstate Insurance Company, 258 F.2d 888 (10th Cir. 1958);

Stollery Bros., Inc. v. Inter-Insurance Exchange, 15 Ill. App. 2d 179, 145 N.E.2d 768 (1957);

Gabler v. Continental Casualty Company, 295 S.W.2d 194 (Mo. App. 1956);

National Surety Corporation v. Diggs, 272 S.W.2d 604 (Tex. Civ. App. 1954);

Kentucky Farm Bureau Mut. Ins. Co. v. Miles, 267 S.W.2d 928 (Ky. 1954);

Travelers Ins. Co. v. Boyd, 312 Ky. 527, 228 S.W.2d 421 (1950).

7 Am. Jur. 2d 574, Automobile Insurance, Sec. 225 states:

"With regard to a policy of automobile liability insurance voluntarily obtained, the general rule followed by most of the courts is that the breach of contractual provisions relating to acts or omissions

> subsequent to the accident is, in the absence of collusion between insurer and insured, available to the insurer as against the injured person, if, in the circumstances, it would have been available against the insured. In other words, the injured person stands in the shoes of the insured regarding defenses of this character, except in unusual cases where the effect of the insured's failure to comply with the conditions of recovery may be avoided by compliance by the injured person himself."

In this very case, the late Judge Arthur M. Davis expressly rejected appellee's argument and ordered on February 12, 1963, as follows:

> "It is contended that those cases have been modified by 9 ARS Sec. 28-1170. That statute applies only to those motor vehicle liability policies which are certified to the Department of Financial Responsibility as proof of financial responsibility after the happening of an accident. There is nothing in plaintiff's complaint to show that that is the situation between the litigants." (T.R. 86-87)

Cf. cases collected, 31 A.L.R.2d 645; 7 Appleman, Insurance Law and Practice 120, Sec. 4297.

This court has previously recognized the validity under Arizona law of the policy defense of non-cooperation in the case of State Farm Mutual Automobile Insurance Company v. Palmer, 237 F.2d 887, 60 A.L.R.2d 1138 (9th Cir. 1956).

Certainly if the Arizona court in Jenkins v. Mayflower, supra, had taken upon itself to destroy all policy defenses previously available to automobile liability insurers, such

n interpretation would clearly run afoul of the impairment f contract prohibitions of Article 1, §10 of the United tates Constitution and of Article 2, §25 of the Constitution of Arizona, and also of the "due process" provisions f the 14th Amendment to the United States Constitution and rticle 2, §4 of the Constitution of Arizona. Appellant espectfully submits that the court below erred in holding he policy defense of non-cooperation to be abrogated by the ayflower case and that the judgment of the court below should e reversed and the case remanded with directions that judgent be entered in favor of appellant.

CONCLUSION

Appellant respectfully submits that the uncontroverted acts presented to the court below establish that before, at he time of, and after the automobile accident from which ppellee's claim arises, appellee was a "member of the family," residing in the same household" as Joel Bailleres, the inured, and therefore excluded from the coverage of the liability rovisions of appellant's policy. Therefore, the court below rred in granting appellant's motion for summary judgment and ntering judgment thereon and in failing to grant appellant's otion for summary judgment.

Further, appellant respectfully submits that the court elow erred in its interpretation of the Mayflower case and he Arizona Financial Responsibility law as abrogating the olicy defense of non-cooperation. In awarding judgment in

favor of appellee in the sum of $5,000.00 (the Financial Responsibility limits) rather than the actual $10,000.00 limits of appellant's policy, the court below, of necessity, found Bailleres guilty of non-cooperation which constituted a material and substantial breach of one of the conditions of appellant's policy. However, the court held that such breach was not a defense as to the $5,000.00 financial responsibility limits. Appellant submits that in so doing, the court below erred. Appellant respectfully prays that this court vacate the judgment of the court below, reverse said judgment and remand the case with directions that judgment be entered in favor of appellant and against appellee.

Respectfully submitted,

KENNETH S. SCOVILLE

By _____
LEROY W. HOFMANN
407 Luhrs Tower
Phoenix, Arizona
Attorneys for Appellant

RECEIPT OF SERVICE

Due service and receipt of three copies of the foregoing Appellant's Opening Brief acknowledged this _____ day of _____, 1965.

LANGERMAN, BEGAM & LEWIS

By _____
Attorneys for Appellee
1400 Arizona Title Building
Phoenix, Arizona 85003